BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TROY J. MOODY	)	
Claimant	)	
V.	)	
	)	
KBW OIL & GAS COMPANY	)	Docket No. 1,061,663
Respondent	)	
AND	)	
	)	
AMERICAN INTERSTATE	)	
INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent requests review of Administrative Law Judge John Clark's October 2, 2013 preliminary hearing Order.[1] W. Walter Craig of Derby, Kansas, appeared for claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the administrative law judge and consists of the record noted in this Board Member's July 23, 2013 Order, in addition to the David E. Harris, D.O., August 8, 2013 deposition transcript and exhibits thereto, the Michael Leahy, Psy.D., September 18, 2013 deposition transcript and exhibits thereto, the Stipulation dated September 20, 2013, the October 1, 2013 preliminary hearing transcript and exhibits thereto, and all pleadings contained in the administrative file.

ISSUES

Respondent argues Judge Clark's preliminary hearing Order should be reversed because he lacked jurisdiction to issue a preliminary award of benefits after the conclusion of a full hearing. Further, respondent contends claimant failed to prove his psychological problems arose out of and in the course of his employment because such problems are preexisting and claimant did not set forth valid prevailing factor and directly traceable opinions on causation. Claimant maintains the preliminary hearing Order should be affirmed.

[1] A Nunc Pro Tunc Order was issued on October 9, 2013 correcting the date of hearing in the initial order. A second Nunc Pro Tunc Order was issued on October 16, 2013 ordering respondent to also pay the past medical bills incurred by Dr. Leahy, as well as medical mileage to Dr. Leahy.

The issues on appeal are:

1. May an administrative law judge issue a preliminary hearing order after the regular hearing already occurred?

2. Is claimant's psychological condition due to his accidental injury, including:

   A) was the accident the prevailing factor[2] in causing his injury and medical condition;

   B) did he suffer a traumatic neurosis directly traceable to his physical injury; and

   C) did his injury solely aggravate, accelerate or exacerbate a preexisting condition or render a preexisting condition symptomatic?

FINDINGS OF FACT[3]

Claimant sustained work-related injuries on September 23, 2011, when a moving part of an oil well struck him. He testified he sustained a traumatic brain injury, as well as injuries involving his neck, left shoulder, left clavicle, jaw, teeth and low back. His neck and shoulder injuries required surgeries. Further, claimant asserted mental health issues and cognitive deficit, including anxiety, nightmares of his accident and memory deficit. Due to difficulty balancing his checkbook, he assigned such task to his adult children.

On June 3, 2013, both a preliminary and regular hearing were held. In the preliminary hearing Order, Judge Clark found claimant's injuries compensable and ordered treatment with Eric Clarkson, D.O., for his physical injuries and with Michael Leahy, Psy.D., for his psychological problems. Respondent appealed the Order to the Board.

This Board Member agreed with Judge Clark that claimant was entitled to medical treatment with Dr. Clarkson for his physical injuries. However, this Board Member reversed the ruling regarding psychological treatment with Dr. Leahy because claimant failed to prove required elements for a compensable psychological injury.

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[2] Respondent's prevailing factor argument is under the umbrella of what is an accident, pursuant to K.S.A. 2011 Supp. 44-508(d), and whether an injury by accident arises out of employment, pursuant to K.S.A. 2011 Supp. 44-508(f)(2)(B)(ii). While respondent admitted at page three of the regular hearing transcript that claimant sustained personal injury by accident arising out of and in the course of his employment, it is evident respondent is reserving arguments regarding prevailing factor, sole aggravation of a preexisting condition and the nature and extent of claimant's injuries.

[3] The facts set forth in this Board Member's July 23, 2013 Order are incorporated by reference.

One of respondent's points of contention is that claimant had depression and chronic pain prior to his September 23, 2011 accident. At a September 9, 1999 preliminary hearing in a separately docketed case concerning a low back injury, claimant was granted psychological counseling for an aggravation of preexisting depression. Claimant had two low back surgeries, including a lumbar fusion. Following a January 3, 2000 evaluation, Pedro Murati, M.D., was of the impression that claimant had clinical depression. Claimant also had a prior work-related neck injury that required a cervical fusion in 2010.

Pre-injury records from Kirk Bliss, D.O., generally document claimant's complaints of chronic low back pain from early-2006 forward and his use of various muscle relaxers and narcotic medications, including OxyContin.[4] Claimant was prescribed Cymbalta on August 11, 2008. Such record also listed Ambien as one of claimant's medications. A September 15, 2008 phone note in Dr. Bliss' records indicated claimant previously took Wellbutrin, Paxil and Zoloft for depression and arthralgias/back pain. Dr. Bliss prescribed claimant Percocet on November 24, 2009, and arranged for a CT myelogram of his lumbar spine. On March 8, 2010, Dr. Bliss observed claimant was under a lot of stress relative to his chronic spine problems and because claimant was scheduled for cervical spine fusion the next week. Dr. Bliss switched claimant from Ambien to amitriptyline on July 20, 2010 because claimant was not sleeping well, apparently due to chronic neck pain and paresthesias in his right arm. As of February 28, 2011, claimant's low back was reported as being relatively well, but his neck would bother him off and on. Dr. Bliss noted that claimant had muscle spasm of the cervical spine and he prescribed Neurontin and Robaxin.

After claimant's accident, from May 24, 2012 forward, he received psychological treatment from Michael Leahy, Psy.D., a clinical psychologist/psychotherapist.

Shelly McDaniel, Ph.D., a neuropsychologist, evaluated claimant and prepared a June 11, 2012 report. Such report noted that she previously prepared a November 3, 2011 report, but such report is not in evidence. Dr. McDaniel's June 11, 2012 report stated claimant was endorsing severe posttraumatic stress disorder (PTSD), even though initial testing (presumably done prior to the November 3, 2011 report) did not show evidence of PTSD. Claimant's depression and anxiety were higher than average, but his somatic complaints were average for what Dr. McDaniel termed the "medical pain population" or the "pain patient population."[5]

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[4] In a Stipulation dated September 20, 2013, the parties offered into evidence records from Dr. Bliss, along with Dr. Prostic's August 12, 2013 report.

[5] P.H. Trans. (Oct. 1, 2013), Resp. Ex. 1 at 2.

Dr. McDaniel observed that claimant passed a memory test when he demonstrated effort, but "flunked most embedded measures of effort and responded in interview with new emotional symptoms."[6] Her report concluded:

> SUMMARY AND IMPRESSIONS
>
> Diagnosis: 854.0 TBI, previously diagnosed
>
> The patient's overall neuropsychological profile is notable for variable effort, flunked embedded measures of effort, his cognitive symptoms are now worse, and he reports new emotional symptoms. Without the patient's full cooperation and effort, it is assumed he is malingering at this point for reasons only known to him. If he should decide to participate meaningfully in the next assessment, I will be happy to test him again so we can make serious treatment plans for any deficits remaining.
>
> RECOMMENDATIONS
>
> None. Based upon his obviously conscious effort to deceive, I believe he can consciously go back to work and be successful. I will defer to the physicians that rate his physical impairments to make recommendations for physical restrictions.[7]

Claimant was evaluated by David E. Harris, D.O., at respondent's request, on January 3, 2013. Dr. Harris specializes in physical medicine and rehabilitation, including pain management. Dr. Harris reviewed 575 pages of medical records and examined claimant. He opined claimant had an overall 30% whole body impairment consisting of:

- a 15% whole body impairment for his cervical spine;
- a 10% left upper extremity impairment for his left brachial plexus;
- a 13% impairment to the left upper extremity at the level of the shoulder; and
- a 5% whole body impairment for residuals of a traumatic brain injury, including minimal difficulty with multitasking, short-term memory, organization, mood and emotional disorders, including anxiety and what claimant termed PTSD. The 5% whole body rating for the head injury consisted of 3% for mental status impairment and 2% for emotional and behavioral impairment.

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[6] *Id.*

[7] *Id.*, Resp. Ex. 1 at 4.

Dr. Leahy prepared an August 1, 2013 report that states, in pertinent part:

> From work with Mr. Moody I'm familiar he had mood and alcohol abuse concerns at an earlier time in his life related to the stress of a difficult divorce process. Nevertheless, Mr. Moody's current mood, anxiety, and cognitive dysfunction are clearly a direct residual effect of his occupational accident in September of 2011. These symptoms are a byproduct of physical impairment, chronic pain, cognitive impairment, economic hardship and social loss.[8]

Dr. Harris testified on August 8, 2013. Dr. Harris testified he was unaware claimant was depressed, suffering from insomnia or taking medication before the accident. He noted if claimant was taking amitriptyline and Percocet before his accident, such facts would suggest he had preexisting depression, nerve pain, insomnia and pain syndrome.

Dr. Harris testified claimant did not report having been diagnosed with or treated for depression or having problems with insomnia and anxiety or stress prior to September 23, 2011. In a series of questions in which respondent's counsel asked if claimant told Dr. Harris that he had been treated by various mental health providers, Dr. Harris indicated he had no recollection of any such conversations. Dr. Harris could not say whether a history of claimant's prior depression was contained in the 575 pages of records he reviewed, just that any such history was neither listed in his report nor given to him by claimant. Dr. Harris testified he did not know Dr. Leahy and did not have Dr. Leahy's records.

Dr. Harris acknowledged it would be difficult or perhaps impossible to determine if the September 23, 2011 accident was the prevailing factor, presumably in causing claimant's injury, medical condition, and resulting disability or impairment, without having all the information regarding preexisting conditions, including claimant's prior history of depression, insomnia and anxiety or stress. He therefore testified he could not provide a prevailing factor opinion. Similarly, Dr. Harris agreed that absent an understanding of claimant's preexisting medical history, he could not determine if claimant's September 23, 2011 accident caused a new injury or a simple aggravation of a preexisting condition.

Dr. Leahy testified on September 8, 2013. He testified he did not conduct any standardized psychological testing because his role was to be claimant's therapist. Dr. Leahy testified he was aware claimant had received psychological treatment in the late-1990s and early-2000s for alcohol abuse, depression, marital counseling and follow-up counseling for depression secondary to his chronic pain syndrome, but had no knowledge of any treatment as early as 1992 or 1993. Dr. Leahy was not provided with claimant's prior psychological records, but acknowledged that if claimant was previously taking Effexor, Klonopin and Wellbutrin, it would be suggestive of preexisting depression and anxiety. While Dr. Leahy was not provided with records from Kirk Bliss, D.O., that would suggest claimant had pre-injury chronic pain, he agreed that claimant suffered from chronic pain before his September 23, 2011 accidental injury.

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[8] Leahy Depo., Ex. 2 at 1.

Dr. Leahy testified as follows:

> Q. What . . . I'm asking you here today is, do you have an opinion within a reasonable degree of medical certainty as to whether Mr. Moody's current need for ongoing medical care and the medical care you've provided to date is a direct and proximate result or cause from the work-related injuries he sustained on September the 23rd of 2011?
>
> A. I'd have to answer that in two ways. Yes, I have a clear opinion about it, I can't say it's medical certainty, I'm not a physician.
>
> Q. Okay. What is your opinion with regard to your opinion as to whether his current psychological needs are a direct result of the work-related injuries that occurred on September 23rd, 2011?
>
> MR. TORLINE: I'll raise an objection, lack of qualification, as well as lack of foundation. You may answer.
>
> Q. Go ahead and answer.
>
> A. I feel clearly that the trauma from his work accident is the prevailing factor in his current psychological status and psychological difficulties.
>
> . . .
>
> Q. The fact that he had some pre-existing treatment, is that indicative - - or do you have an opinion as to whether this particular injury is the current and proximate prevailing factor as to his ongoing need for psychological treatment?
>
> A. Yes, I believe as you phrased it, that his current - - it is the prevailing dominant factor.[9]

While he had never provided a rating before, Dr. Leahy provided claimant with a 10% whole body rating for cognitive impairment and a 20% whole body rating for emotional/behavioral impairment. Dr. Leahy indicated claimant will require psychological treatment for the rest of his life.

Dr. Leahy was critical of Dr. McDaniels' opinions and was "confused and baffled" regarding her conclusion that claimant was malingering.[10] Dr. Leahy noted that his impressions of claimant were "very clear" based on having seen claimant for 17 hours over a 16 month time period.[11]

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[9] Leahy Depo. at 6-8.

[10] *Id.* at 14; see also pp. 16-20.

[11] *Id.* at 20.

A preliminary hearing was held October 1, 2013. Claimant requested authorization of Dr. Leahy for psychological treatment. The following order issued the next day:

> A preliminary hearing was held on June 3, 2013, where Dr. Michael Leaky [*sic*] was authorized as the Claimant's treating medical provider for his psychological problems and Dr. Eric Clarksen [*sic*] was authorized as the Claimant's treating physician for his physical injuries.
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> This Order was timely appealed by the Respondent.
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> On July 23, 2013, the Board found:
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> *"1. A preliminary order of medical treatment, even after claimant presumably reached MMI, does not present an appealable issue."*
>
> The Board found that the *"Claimant failed to prove his need for psychological treatment was due to accidental injuries arising out of and in the course of his employment, ..."*
>
> On September 18, 2013, the Claimant took the deposition testimony of Dr. Michael Leaky [*sic*], Psy. D.
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> Dr. Leaky [*sic*] testified:
>
> *"I feel clearly that the trauma from his work accident is the prevailing factor in his current psychological status and psychological difficulties."*
>
> Dr. Michael Leaky [*sic*] is authorized as the Claimant's treating medical provider for his psychological problems.
>
> Dr. Eric Clarksen [*sic*] is authorized as the Claimant's treating physician for his physical injuries.[12, 13]

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[12] ALJ Order (Oct. 2, 2009) at 1-2. The judge's order could be erroneously interpreted as indicating the Board previously concluded it had no jurisdiction to consider respondent's prior appeal, but nevertheless ruled against claimant. To dispose of such needless confusion, this Board Member previously ruled claimant failed to prove his need for psychological treatment was due to accidental injuries arising out of and in the course of his employment, which is an appealable issue from a preliminary hearing order. Such issue was wholly distinct from the separate issue whether the judge could order medical treatment after claimant presumably reached MMI, which is not an appealable issue from a preliminary hearing order.

[13] Respondent argues, in a footnote, that Judge Clark lacked authority to order medical treatment with Dr. Clarkson because claimant's demand letter contained no such specific demand. Even if this Board Member were to agree, the issue is moot: Judge Clark's June 3, 2013 preliminary hearing Order already required respondent to provide claimant medical treatment with Dr. Clarkson. Such ruling was affirmed by the Board and still stands.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b provides that the burden of proof is on the claimant to establish his or her right to an award of compensation based on the whole record.

K.S.A. 2011 Supp. 44-508 provides, in part:

> (f)(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
>
> . . .
>
> (B) An injury by accident shall be deemed to arise out of employment only if:
>
> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
>
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
>
> (3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
>
> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
>
> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
>
> (iii) accident or injury which arose out of a risk personal to the worker; or
>
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
>
> . . .
>
> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.
>
> (h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-534a(a)(2) provides in part:

> Upon a preliminary finding that the injury to the employee is compensable in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues.
>
> . . .
>
> Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Love*,[14] the Kansas Court of Appeals stated:

> In order to establish a compensable claim for traumatic neurosis under the Kansas Workers' Compensation Act, . . . the claimant must establish: (a) a work-related physical injury; (b) symptoms of the traumatic neurosis; and (c) that the neurosis is directly traceable to the physical injury.

The Kansas Supreme Court in *Berger*[15] cautioned:

> Even though this court has long held that traumatic neurosis is compensable; we are fully aware that great care should be exercised in granting an award for such injury owing to the nebulous characteristics of a neurosis. An employee who predicates a claim for temporary or permanent disability upon neurosis induced by trauma, either scheduled or otherwise, bears the burden of proving by a preponderance of the evidence that the neurosis exists and that it was caused by an accident arising out of and during the course of his employment.

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[14] *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, Syl., 771 P.2d 557, *rev. denied* 245 Kan. 784 (1989).

[15] *Berger v. Hahner, Foreman & Cale, Inc.*, 211 Kan. 541, 550, 506 P.2d 1175 (1973).

ANALYSIS

1. Judge Clark had authority to issue a preliminary hearing Order to be in effect until an award is issued.

Respondent argues K.S.A. 2011 Supp. 44-534a(a)(2) only permits an administrative law judge to order preliminary benefits pending the conclusion of a full hearing on the claim. Respondent argues the terms "full hearing" and "regular hearing" are synonymous and "full hearing" should not be confused with the term "award." Respondent points out that the Kansas legislature knows how to use the term "award" when it means to do so, insofar as such term is frequently used in various statutes instead of the term "full hearing."

Respondent argues the K.S.A. 44-523(d) requirement that a prehearing settlement conference be held at least 10 days prior to the first full hearing cannot mean 10 days prior to the decision or award, such that the only logical meaning of full hearing is the regular hearing. Respondent also cites Board cases finding a full hearing to be the regular hearing, at least for K.S.A. 44-512b(a) and K.S.A. 44-567(d) purposes. Respondent argues that because a full hearing is the regular hearing, Judge Clark erred in issuing a preliminary order after the regular hearing occurred.

The meaning of "full hearing," in the specific context of K.S.A. 44-534a, is stated in *Schmidtlien*:[16] a "'full hearing' means an exploration of the issues resulting in the ultimate decision, *e.g.*, whether claimant is entitled to workers compensation benefits."[17]

Schmidtlien, citing *Clairborne*,[18] also states:

> It is true that the term "hearing" has both a narrow and a broad meaning. As applied to administrative proceedings the term "hearing" is usually construed as meaning the *whole proceeding* including the ultimate decision therein. (*Chicago Ry. Equipment Co. v. Blair*, (C.C.A.), 20 F.2d 10, 11.) The decisions recognize the term "hearing" as relating not to physical presence at the taking of evidence, but to certain procedural minimums to ensure an informed judgment by one who has the responsibility of making the final decision and order. [Citations omitted.]"

Schmidtlien further references *Sawyer*,[19] which stated, "The phrase, 'the conclusion of a full hearing on the claim,' appearing in K.S.A.1989 Supp. 44-534a, refers to the date of the award entered by the administrative law judge as a result of the hearing held after the preliminary hearing."

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[16] *Schmidtlien Electric, Inc. v. Greathouse*, 278 Kan. 810, 104 P.3d 378 (2005).

[17] *Id.* at 825.

[18] *Clairborne v. Coffeyville Memorial Hospital*, 212 Kan. 315, 319, 510 P.2d 1200 (1973).

[19] *Sawyer v. Oldham's Farm Sausage Co.*, 246 Kan. 327, 333, 787 P.2d 697 (1990).

Respondent's arguments are well-stated, but the Board is duty bound to follow binding precedent.[20] This Board Member is constrained to interpret the meaning of the "conclusion of a full hearing" as handed down by the Kansas Supreme Court in *Schmidtlien*. The conclusion of a "full hearing" does not occur when a regular hearing is adjourned. In this case, a full hearing has yet to occur because an award has not been entered.

2. Claimant's accident is the prevailing factor causing his psychological injury, medical condition, and resulting disability. Claimant's traumatic neurosis is directly traceable to his September 23, 2011 work-related injuries. There is insufficient proof claimant's injury solely aggravated, accelerated or exacerbated a preexisting condition or rendered a preexisting condition symptomatic.

Dr. Leahy indicated the accident was the prevailing factor causing claimant's injury, medical condition, and resulting disability or impairment. Respondent's medical expert, Dr. Hufford, who is neither a psychologist, psychiatrist or mental health expert, testified that he could not state that the prevailing factor in claimant's condition was the accident. Dr. McDaniels' report certainly raises concerns, but based on the facts and current evidence, this Board Member gives more weight to the opinion from Dr. Leahy based on his multiple evaluations of claimant over an extended period of time.

While Dr. Leahy did not simply pull "magic words" from the *Love* case and clearly state claimant's traumatic neurosis was directly traceable to his physical injury or injuries, the same result follows. It is sufficient that Dr. Leahy indicated in his report that claimant's psychological symptoms were the "direct residual effect" of the September 23, 2011 accident, which resulted in physical impairment and chronic pain. Dr. Leahy also agreed that claimant's injury was the "proximate prevailing factor" or "dominant factor" in claimant's need for psychological treatment.

Claimant certainly had prior depression and chronic pain. While medical evidence is not absolutely necessary to prove a sole aggravation, acceleration or exacerbation of a preexisting condition or that a preexisting condition was rendered symptomatic, expert medical testimony would have been helpful. The record contains no testimony that claimant's injury or injuries "solely" aggravated, accelerated or exacerbated a preexisting condition or rendered a preexisting condition symptomatic. While claimant acknowledged prior depression and pain, there is insufficient evidence to support respondent's argument advanced under K.S.A. 2011 Supp. 44-508(f)(2). Moreover, the evidence tends to show claimant's traumatic brain injury resulted in more than just depression, but also caused cognitive impairment that was not preexisting.

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[20] See *Gadberry v. R. L. Polk & Co.*, 25 Kan. App. 2d 800, 808, 975 P.2d 807 (1998).

CONCLUSIONS

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member concludes:

- Judge Clark had authority to issue a preliminary hearing Order to be in effect until an award is issued;
- claimant's accident is the prevailing factor causing his psychological injury, medical condition, and resulting disability;
- claimant's traumatic neurosis is directly traceable to his September 23, 2011 work-related injuries; and
- there is insufficient proof claimant's injury or injuries solely aggravated, accelerated or exacerbated a preexisting condition or rendered a preexisting condition symptomatic.

WHEREFORE, the undersigned Board Member affirms the preliminary hearing Order.[21]

IT IS SO ORDERED.

Dated this _____ day of November, 2013.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable John Clark

[21] By statute, these preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.